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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. BRADLEY J. DOWELL, Defendant and Appellant.	B215971 (Los Angeles County Super. Ct. No. PA 049692 Consolidated with PA 059081)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Roberta L. Davis and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Bradley J. Dowell was charged with crimes relating to two separate incidents. With regard to a 2004 incident at a bar called the "Wild," Dowell was convicted of four counts of assault and/or battery. With regard to a 2007 incident at a bar called the "Blarney Cove," Dowell was convicted of one count of second degree murder and one count of attempted voluntary manslaughter. The jury found true all the related great bodily injury and use of a deadly weapon special allegations. The court found true all the prior conviction allegations, including a strike prior, and sentenced defendant to a determinate term of 18 years and 6 months, and a consecutive indeterminate term of a total of 37 years to life. Defendant, who timely appealed his convictions, contends the court erred in permitting a joint trial on all the charges, in allowing him to be impeached with unsanitized prior convictions and by refusing to instruct the jury on sudden quarrel/heat of passion voluntary manslaughter. We affirm.

FACTUAL BACKGROUND

I. Prosecution Case

A. August 18, 2004, Incident at The Wild

Around 1:00 a.m., Gracie Rogers was at the Wild, a bar in Chatsworth, with some coworkers, including Joseph Rispaud. Alsyan Achen, a friend of Rogers, was also at the bar, but they had not come together.

Achen had ordered one drink and was playing pool. Appellant, his sister Diana Tisinger, her friend Lori, and Ron Garmen were also at the Wild. Tisinger burned Achen's back with a cigarette. Achen turned around and told Tisinger that she had burned Achen. Tisinger asked Achen if she wanted to "take it outside." Achen responded, "Why would I want to go with you. You and your friend are going to basically beat the crap out of me right now." Then Achen went behind the bar because Tisinger and her female friend were being confrontational. Achen stayed behind the bar and exchanged words with Tisinger and her friend for a while until appellant picked up a pint glass and threw it in Achen's face. The glass "broke" Achen's right eye. Jennifer Roberts, the

bartender, tried to call 9-1-1, but one of the women said not to call. Roberts tossed the phone and either Tisinger or her female friend cut the phone line with a knife.

Then appellant went behind the bar and grabbed and pulled Achen by the hair. Appellant pulled out the hair on the entire right side of Achen's head. Achen tried to protect her face as she was repeatedly hit and stomped on. Appellant spit at Achen. Achen lost consciousness and woke up on the ground behind the bar as people tried to help her to the bathroom.

After seeing Achen being hit repeatedly, Rispaud ran over to the bar and said, "'You're hitting a girl, you're hitting a girl.' . . . Stop." Rispaud did not threaten or touch appellant, but appellant struck Rispaud in the back of the jaw and head, and Rispaud fell backwards, hit a bar stool and blacked out on the floor. When Rispaud regained consciousness, he was bleeding from the top of his head.

As Achen came from behind the bar, she was crying and holding her hand behind her neck. Achen and another woman ran to the bathroom. Rogers found Achen on a bathroom stool crying and holding her neck. Achen said she was seeing stars and her neck tingled. An ambulance came and took Achen to the hospital. Achen was hospitalized for almost a month and treated for a fracture to her right orbital, a broken neck and a swollen face. Rispaud was also treated at the hospital.

B. March 3, 2007, Incident at The Blarney Cove Bar

Jarrod Anderson, his brother Kyle, Daniel Correa and Elvin Dudea arrived at the Blarney Cove around 10:30 p.m. Jarrod had drunk a few beers before arriving at the Blarney Cove. Dudea, the designated driver, did not drink. The men had never had any trouble before at the Blarney Cove. Kyle's girlfriend Rose Falcone, Kristin Mendenhall, Eric Mullen and Clint Dillobough were also at the bar. The group of friends hung out near the pool table and played pool. The men did not have any weapons with them and

none of them fought, had a conflict with, or threatened anyone inside or outside the bar that night.

Appellant, his sister Tisinger, and Garmen met Jacob Jones at the Blarney Cove around 12:30 a.m. Appellant drank beer and initially hung out with Tisinger, Garmen and Jones near the front of the bar and, later, by the pool tables. Appellant had a chrome metallic clip pocket knife in his left rear pocket.

After last call, Jarrod, who was "a little bit more than buzzed," and Correa, left the bar through the back door. Then Jarrod went through the alley to the front of the bar and saw Correa on the ground bleeding from the neck.[1] By this time, Jones, who had left the bar, also saw Correa on the ground, appellant behind a block wall on Lowe's Home Improvement Store property and Tisinger being assaulted by a man in between cars in the parking lot. Garmen was fighting with a man, who did not have a weapon.

Appellant said, "We should get out of here," wiped his hands or an object in his hands using either his bandana or the black shirt he had been wearing earlier but had taken off, and left. After the man who was assaulting Tisinger left, Jones wrapped his flannel shirt on the back of Tisinger's bleeding head and took her to his residence. Appellant did not come back for his sister. Jones cleaned up Tisinger, dumped her clothes in a dumpster and took her home.

Jarrod tried to stop Correa's bleeding by using his hand to cover Correa's wound. A few women stood over Jarrod and Correa and cried. There was a crowd of five or six people to the right of the sidewalk, including appellant, who stood out because of his clothing and how he wore his goatee.

Although Jarrod left the bar without any injury, when a woman told him that he was bleeding from the neck, Jarrod realized he had been stabbed. Jarrod did not notice any fights in the parking lot and did not see anyone who was injured other than himself and Correa. After Jarrod heard the sound of ambulances, he became dizzy and fell to the

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[1] Jarrod did not remember what had happened between leaving the bar and observing Correa on the ground.

ground. Before he left the bar, Jarrod had not threatened anyone, and he did not see Correa threaten anyone. Kyle had been stabbed in the back; Jarrod did not see who stabbed his brother. Paramedics arrived and took Jarrod to the hospital where he had surgery on his neck; Jarrod was hospitalized for a few days.

After he arrived at the scene, Detective Joel Price recovered a knife in the rear delivery/receiving area of the Lowe's store. Detective Michael Pelletier subsequently obtained video footage from the Blarney Cove. Footage of the loading dock area at Lowe's around 2 a.m. depicted appellant jumping the fence from the loading dock and going towards a door behind a secured gate.

The next evening, Tisinger was arrested at her parents' home for stabbing Kyle Anderson in the back. Detective John Doerbecker searched the home and found a pair of extra large gray sweatpants with red stains on them, a long sleeved black T-shirt and two knives. It did not appear that appellant lived there.

Meanwhile, that night Jeffrey Vasalech was visiting his aunt Penny in Sparks, Nevada. Penny, her daughter, Deanna Brinkley and her two daughters (all of whom lived with Penny) planned to go to the movies. Instead, Vasalech drove Brinkley to the Reno Airport. When Vasalech saw Brinkley around 11 a.m. the next morning, appellant was with her and introduced himself as her boyfriend. Vasalech noticed appellant, who had abrasions on his knuckles, looked out the window a lot and asked questions about who called, who everyone talked to and who was at the house. Appellant said that he was in Sparks because he had gotten into a fight in a bar in the San Fernando/Los Angeles area and that he liked to fight. Although appellant had his own cell phone, he used the pink cell phone of Brinkley's daughter in case the police were tracking his phone. Vasalech saw a car at the house that he had never seen before; later, he took Brinkley to a rental company to return the car.

On March 4, appellant called Jones and admitted that he stabbed a few men by "put[ting] metal in necks," and said he felt out numbered and threatened. Appellant mentioned he would try to find the woman who stood over Correa. Appellant did not

mention that he had stabbed to protect his sister or that anyone other than himself had any weapons. Jones told Detective Doerbecker that appellant said he was going to take care of the witness so that she did not testify and that he was going out of town. When Jones told appellant that he thought someone had died, appellant said something like, "Yeah, probably." Appellant also said that after he stabbed Correa, he "was just sticking dudes after that."

On March 8, Doerbecker was at the Sparks police station when appellant was arrested. The Sparks Police Department had obtained a driver's license from appellant that Doerbecker believed was counterfeit. That same day, Doerbecker also spoke with Vasalech, who was in custody. A month later, Vasalech's parole officer notified Doerbecker that Vasalech had some information to share.

Vasalech subsequently relayed to Doerbecker statements appellant made to Vasalech. Vasalech had shared a jail cell with appellant in Nevada. Appellant told Vasalech that he, Tisinger, Garmen and her friend went out to a bar. While there, Tisinger bumped into a man and started to argue with him. Tisinger and the man went outside. The man punched his chest and acted like a "bad ass." Tisinger punched the man. Later, when appellant was outside, he saw Tisinger fighting with the man she had bumped into, and he jumped into the fight. When Tisinger was getting beaten up on the ground, appellant stabbed the man he was fighting with in the neck and stabbed the man Tisinger was fighting with in the back. Then, appellant jumped over a fence to a warehouse type building on the other side of the bar and ditched the knife. Appellant called and told his "best homie" to pick him up. Then, appellant went home and washed his clothes. Appellant said he was not afraid during the fight.

Appellant told Vasalech that he was going to have someone in Los Angeles "take care of things" for him and dispose of his clothes. Appellant said no one would snitch on him as "we were going to take care of that." Appellant had heard Tisinger was not going to take the "rap" for him unless he told the truth. Appellant talked about another fight where a "chick" whose neck was broken was no longer going to talk, testify, or come

forward because she had "already got talked to." Appellant said he always carried a knife.

The deputy coroner testified Correa died as a result of a stab wound to the neck. Correa had several small cuts and puncture wounds on the fingers of both hands consistent with defensive-type wounds. Correa had no bruising on his hands that would indicate he punched anyone.

II. Defense Case

Appellant testified at trial. Appellant explained he was adopted and Tisinger, who was 10 or 11 years older, helped raise him.

Appellant was convicted for being a felon in possession of a firearm in 1999 and for assault with a deadly weapon in 1998.

On August 18, 2004, while at the Wild with Tisinger, her girlfriend Lori and Garmen, appellant drank a lot. At some point, Tisinger and Lori argued with another woman. Appellant tried to break up the argument; he threw a plastic glass in Achen's direction, but not at her. Appellant admitted he punched Rispaud when Rispaud was not looking, but he denied pulling Achen's hair and said Tisinger did it. Appellant denied hitting or striking Achen. Shortly after the incident, appellant stayed in Washington State for about a year and then went to Nevada.

On March 3, 2007, appellant got to the Blarney Cove around 12:00 midnight. Appellant drank beer at the bar.

Although appellant initially hung out in the front of the bar, after 10 or 20 minutes, he moved to the pool table area. Appellant recognized Eric Mullen, Clint Dillobough, Valerie Walker and Kyle, who all hung out together and hung with Jarrod and Correa. Mullen had introduced himself to appellant before as "Warrior" from "SFV," a clique of the Peckerwood gang. Appellant had seen Mullen's tattoos before: "SFV" on the back of his head, "'V'" on his stomach, and "'Warrior'" in big writing across his chest. That

night, Dillobough, who had previously identified himself to appellant as a Peckerwood gang member, wore a beanie with "'Support S.F.V.'" on it.

Appellant was uncomfortable that Peckerwood and SFV gang members were at the Blarney Cove because he knew the Peckerwood gang had a reputation for being violent and that anything goes with that gang. Appellant was scared because Dillobough, Mullen and Kyle "mad dogged"[2] appellant and others in his group. Appellant stayed because Tisinger wanted to play pool. At some point, Kyle bumped appellant from behind and told appellant to look out. Appellant pointed at Kyle and said, "'Hey man, sorry about that,'" but Kyle ignored appellant. Appellant was not confrontational with anyone at the bar and tried to stay away from Dillobough, Mullen and Kyle. At some point, appellant had some friendly contact with Correa.

Appellant had a knife on him because he had helped someone with construction work that day. After sitting in a corner of the bar, a place no one could get behind or to the side of him, appellant left the bar with Tisinger. Appellant sat in Tisinger's truck while she went to look for Garmen. Kyle, Correa, another man and Rose Falcone walked from the parking lot towards the front of the bar where Garmen and Tisinger stood talking off to the side of the front door. Mullen and Walker were talking to appellant's left.

Then, everything happened all at once. As appellant asked Walker a question, Kyle screamed, "This is 'S.F.V., mother fucker,'" and punched Garmen in the face. Tisinger tried to protect Garmen by putting her hands up and saying "get out of [my] old man's face." As appellant ran toward Tisinger, people came running out of the bar and pushed Kyle back. Some men came from the back of the bar through the alleyway and attacked Garmen. Appellant punched Mullen in the face while Mullen grabbed Tisinger by the hair and swung her around.

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[2] Appellant described "mad dogging" as someone staring a person down, i.e., asking for a confrontation.

After that, appellant tried to keep his head down because men were hitting him. Appellant heard Tisinger scream, "'Get off my brother,'" and somebody else say, "'Get that bitch.'" Appellant fought, guarded himself without looking up, pushed forward and ended up in the parking lot. Appellant estimated 10 people were involved in the fight. Appellant heard Tisinger being beaten and heard her muffled screams for it to stop. Then, appellant fell down in the middle of the parking lot as Dillobough was in front of him. Appellant and Dillobough both went for appellant's knife, which had fallen to the ground. As appellant was kicked and punched, people jumped out of a truck that pulled up. A man ran around the truck with a "mag light" and another man held a pipe as someone threw tools out from the back of the truck. Appellant fought with Dillobough and two or three others. Appellant retrieved his knife, flicked it open, and gestured at the men with the mag light and pipe.

Then appellant heard Tisinger scream so he turned around and went to her. At this time, appellant was afraid for his life and for Tisinger's and Garmen's lives. Appellant returned to where he thought Tisinger was and swung his knife at the first person he came into contact with in the group of four or five people, stabbed him and pulled him off. When someone else took that person's place, appellant swung his knife again at that person's shoulder. Appellant stabbed Kyle in the back. Appellant did not intend to kill either of the people he swung at, he just wanted to stop them.

When the others in the group saw what had happened, they moved away from Garmen, who was on the ground at the bottom of the pile. Appellant had thought Tisinger was at the bottom of the pile, but he saw that Kyle was on top of Tisinger. Kyle held Tisinger's hair and smashed her head onto the cement while someone else kicked her in the ribs. Appellant thought Kyle was going to kill Tisinger and ran up behind Kyle, stabbed him and pulled him back. Appellant, Tisinger and Garmen were up against 13 or 14 men.

When Jones came running up, appellant said, "'Get her to a hospital.'" Appellant watched as Jones took Tisinger to the car and then ran, jumped the fence and "never looked back." Appellant tossed his knife.

Appellant never threatened any witnesses and never told anyone he planned on having witnesses threatened. Appellant did not stay to talk to the police because the men would have killed him. Appellant used the knife to defend himself, Tisinger and Garmen because he was scared for their lives. Appellant left the state because he was afraid of the people he had fought with and afraid of being arrested.

III. Prosecution Rebuttal

When Doerbecker flew back to California with appellant, he did not interrogate appellant or notice that appellant had any cuts or scrapes. Appellant did not mention Garmen, say that he had worked on a construction job on the day of the Blarney Cove fight or identify the person who picked him up at the Blarney Cove after the fight. Although appellant swore he was telling the truth when he talked to the police on March 8 and 18, his stories continued to change during the interviews. Appellant indicated he wanted his sister released and that if he was "going to go down," he would "go down for all of it."

DISCUSSION

I. The court did not abuse its discretion when it joined the two cases.

Appellant contends the court abused its discretion when it permitted joinder/declined to sever the charges arising out of the incident at the Wild and the charges pertaining to the incident at the Blarney Cove. Appellant argues that the evidence of the incident at the Wild was not cross-admissible and that the evidence

relating to the Wild incident was more highly inflammatory and much stronger than the evidence in the Blarney Cove incident.

A. Background

Prior to trial, the prosecution filed a motion to join the two cases filed against appellant, i.e., the felony offenses in counts 1 through 4 and the felony offenses in counts 5 and 6. The prosecutor argued all the offenses were of the same class, the events at the Wild were cross-admissible in the murder case to show appellant's intent or absence of mistake, and the lack of prejudice to appellant in permitting joinder. Appellant opposed the motion on the grounds the prosecution had not established cross-admissibility because of the distinct factual patterns of each case, joinder would be unduly prejudicial to appellant because the murder case was weaker than the assault at the Wild, and the assault would inflame the jury. The court granted the motion.

After the jury had been selected, appellant reiterated his position the cases should not be joined as he would be prejudiced under Evidence Code section 352 as the assault case was a stronger case. The court denied the request for the same reasons it stated earlier. Subsequently, in denying appellant's motion for new trial based on a claim of erroneous joinder, the court stated there had been no clear showing of prejudice and there was more benefit than prejudice in permitting joinder.

B. Motion to Join/Sever

"Because consolidation ordinarily promotes efficiency, the law prefers it. 'Joinder of related charges, whether in a single accusatory pleading or by consolidation of several accusatory pleadings, ordinarily avoids needless harassment of the defendant and the waste of public funds which may result if the same general facts were to be tried in two or more separate trials, and in several respects separate trials would result in the same

factual issues being presented in both trials.'"[3] (Citation omitted.) (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.)

Recently, in *People v. Soper* (2009) 45 Cal.4th 759, 774-775, the Supreme Court discussed the method for reviewing the denial of a motion to sever:

"A defendant, to establish error in a trial court's ruling declining to sever properly joined charges, must make a clear showing of prejudice to establish that the trial court abused its discretion . . . . A trial court's denial of a motion to sever properly joined charged offenses amounts to a prejudicial abuse of discretion only if that ruling falls outside the bounds of reason. We have observed that in the context of properly joined offenses, a party seeking severance must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial.

"Most significantly, the method utilized to analyze prejudice is itself significantly different from that employed in reviewing a trial court's decision to admit evidence of uncharged misconduct. As we observed . . . , among the countervailing considerations present in the context of severance--but absent in the context of admitting evidence of uncharged offenses at a separate trial--are the benefits to the state, in the form of conservation of judicial resources and public funds. . . . [T]hese considerations often weigh strongly against severance of properly joined charges.

"In determining whether a trial court abused its discretion under section 954 in declining to sever properly joined charges, we consider the record before the trial court when it made its ruling. Although our assessment is necessarily dependent on the particular circumstances of each individual case, . . . certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial.

"First, we consider the cross-admissibility of the evidence in hypothetical separate trials. If the evidence underlying the charges in question would be cross-admissible, that

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[3] Appellant concedes joinder under Penal Code section 954 was proper as the charges in the two cases were of the same class. (See *People v. Maury* (2003) 30 Cal.4th 342, 395.) Unless otherwise noted, all statutory references are to the Penal Code.

factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges. Moreover, even if the evidence underlying these charges would not be cross-admissible in hypothetical separate trials, that determination would not itself establish prejudice or an abuse of discretion by the trial court in declining to sever properly joined charges. Indeed, section 954.1 . . . codifies this rule--it provides that when, as here, properly joined charges are of the same class, the circumstance that the evidence underlying those charges would not be cross-admissible at hypothetical separate trials is, standing alone, insufficient to establish that a trial court abused its discretion in refusing to sever those charges.

"If we determine that evidence underlying properly joined charges would not be cross-admissible, we proceed to consider whether the benefits of joinder were sufficiently substantial to outweigh the possible spill-over effect of the other-crimes evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses. In making that assessment, we consider three additional factors, any of which--combined with our earlier determination of absence of cross-admissibility--might establish an abuse of the trial court's discretion: (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case. We then balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state."[4] (Citations, italics & internal quotation marks omitted.) (See also *People v. Cummings* (1993) 4 Cal.4th 1233, 1284 ["The state's interest in joinder gives the court broader discretion in ruling on a motion for severance than it has in ruling on the admissibility of evidence."].)

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[4] The third factor is irrelevant as this case was not a capital case.

C. Cross-Admissibility

Respondent asserts there were commonalities between the two incidents -- appellant got into a fight at a bar where he was drinking with the same people (his sister and Garmen) such that the evidence of the events at the Wild was admissible to show his intent and absence of mistake at the Blarney Cove.

California appellate courts "long have held" that intent can constitute a "'common element of substantial importance.'" (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) As the Supreme Court explained, "there exists a continuum concerning the degree of similarity required for cross-admissibility, depending upon the purpose for which introduction of the evidence is sought: The least degree of similarity . . . is required in order to prove intent . . . . In order to be admissible [for that purpose], the uncharged misconduct must be sufficiently similar to support the inference that the defendant probably harbor[ed] the same intent in each instance." (Citations, italics & internal quotation marks omitted.) (*People v. Soper*, *supra*, 45 Cal.4th at p. 776.)

Accordingly, we agree with respondent that the events at the Wild were cross-admissible as they had a tendency to show appellant knew what he was doing at the Blarney Cove and intended to stab Correa and Jarrod. In denying the motion for new trial based on the claim the trial court erroneously joined the cases, the court stated appellant had not made a clear showing of prejudice. However, as the transcript of the court's original ruling is not part of the record on appeal, we cannot determine what factors the court considered in granting the motion to join.

Moreover, even if the evidence of the events at the Wild would not have been admissible in a separate trial on the charges relating to the Blarney Cove, "Appellate courts have found '"no prejudicial effect from joinder when the evidence of each crime is simple and distinct, even though such evidence might not have been admissible in separate trials."'" (*People v. Soper*, *supra*, 45 Cal.4th at p. 784.) In addition, "complete

cross-admissibility is not necessary to justify joinder." (*People v. Cummings, supra*, 4 Cal.4th at p. 1284.)

D. Inflammatory Nature and Strength of the Cases

We disagree with appellant that the evidence relating to the incident at the Wild was more inflammatory and stronger than the evidence relating to the incident at the Blarney Cove. Even though appellant had a defense to the stabbings at the Blarney Cove, the evidence of each incident was simple, direct and separate. The victims at both incidents (Achen, Correa and Jarrod) were all severely wounded. Appellant claims he conceded he had no defense to the events at the Wild. However, at trial, appellant testified he threw a plastic glass at Achen and missed her and did not hit her or pull her hair. In essence, appellant was claiming he did not assault her, which would be relevant to the ruling on his new trial motion.

The strength of the evidence was not greatly disparate. Witnesses contradicted appellant's version of each incident. Several witnesses testified that appellant threw a glass at Achen and the glass hit her in the face, that he grabbed and pulled Achen's hair to the point of balding the right side of her head, that he hit Achen and punched Rispaud without provocation. With regard to the Blarney Cove incident, appellant admitted he "put metal in necks," and never mentioned to anyone before testifying at trial that he did so to protect his sister. Appellant also admitted he lied to the police and he fled the state after both incidents. Unprovoked assaults are no more inflammatory than indiscriminate stabbings during a mutual combat. (See *People v. Marquez* (1992) 1 Cal.4th 553, 573.)

In addition, there was no gross unfairness to appellant in joining the two cases. (*People v. Arias* (1996) 13 Cal.4th 92, 127 ["Even if the ruling was correct when made, we must reverse if defendant shows that joinder actually resulted in 'gross unfairness,' amounting to a denial of due process." (Citations omitted.)].)

II. Impeaching appellant with his priors did not violate his right to a fair trial.

Appellant contends that the court's ruling allowing impeachment of his testimony by his unsanitized prior convictions violated his due process right to a fair trial. Appellant asserts the court should have referred to the priors as "criminal acts of wrong doing" or acts "involving moral turpitude." Alternatively, appellant suggests the court should have allowed only the dissimilar prior. Defense counsel did not request either alternative.

A. Background

At the close of the prosecution's case-in-chief, the court held a hearing pursuant to *People v. Castro* (1985) 38 Cal.3d 301, because the prosecutor advised the court that she intended to impeach appellant with a 1999 conviction for being in possession of a firearm by a felon and a 1998 conviction for assault with a deadly weapon. The court noted *Castro* required a two-part analysis, i.e., whether the prior involved moral turpitude and whether under Evidence Code section 352, the probative value outweighed the prejudice to appellant. The court concluded both priors were crimes of moral turpitude.

On the second prong, the court invited defense counsel to make an offer of proof as to what appellant would testify to if he chose to testify. Counsel responded appellant would testify he used a weapon in defense of self and others, some individuals were armed, and he stabbed some individuals during a conflict. The prosecutor argued that the priors were relevant to appellant's claim of self defense and his credibility and that appellant should not get to "paint himself as a law-abiding citizen when he hasn't been a law-abiding citizen."

Defense counsel further argued that because the priors involved weapons, they were more prejudicial than probative because they would tend to make the jury believe appellant was an assaultive individual and, as a result, he would be less likely to receive a

fair trial. Counsel also asserted both priors were remote. The court concluded the priors were not remote because appellant had committed other crimes and violated parole afterwards. The court found "that a series of crimes may be more probative for impeachment than a single crime and also prior convictions for the identical offense that is charged are not automatically excluded." In allowing impeachment, the court stated, "the jury will be specifically instructed on how they may utilize these prior convictions should [appellant] testify and that they are deemed to follow the court's instructions. I do find that the probative value outweighs any prejudice to [appellant]."

After appellant took the stand, he acknowledged the two prior convictions.

B. Impeachment

Although respondent argues appellant forfeited this issue because he did not request sanitization of his prior convictions (see *People v. Green* (1995) 34 Cal.App.4th 165, 182, fn. 9), we will address the issue as appellant asserts his counsel was ineffective for failing to do so.

In *Castro*, after stating, it "did not intend to establish rigid standards to govern the exercise of discretion," when admitting a prior conviction to impeach, the court suggested factors to be considered: "(1) whether the prior conviction reflects on honesty and integrity; (2) whether it is near or remote in time; (3) whether it was suffered for the same or substantially similar conduct for which the witness-accused is on trial; and, (4) finally, what effect admission would have on the defendant's decision to testify." (*People v. Castro, supra,* 38 Cal.3d at p. 307.) The trial court considered those factors.

"Under *Castro* the trial courts have broad discretion to admit or exclude prior convictions for impeachment purposes, and must exercise that discretion on motion of the defendant. The discretion is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold

its exercise whether the conviction is admitted or excluded." (*People v. Collins* (1986) 42 Cal.3d 378, 389.)

On appeal, appellant makes no claim his prior convictions were too remote or that they were not crimes of moral turpitude. Moreover, appellant testified. Appellant seems to imply use of the prior convictions should not have been allowed as they were too similar to the charged offenses and because there was ample other evidence with which to challenge his credibility.

Appellant asserts that if credibility was the true issue, it did not matter what the nature of the priors was, but he cites no cases requiring that prior convictions must be sanitized. (See *People v. Dillingham* (1986) 186 Cal.App.3d 688, 695 ["[T]he fact that the three prior convictions were for the same offense . . . as the charged offense no longer compels their exclusion."]; see also *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139 ["[A]s a substantive matter, the ruling admitting the prior conviction [assault with a deadly weapon] was not error, even though the prior offense was similar in some respects to the charged attempted murder."].)

As a matter of fact, in *People v. Barrick* (1982) 33 Cal.3d 115, 127, one of the cases cited by appellant, the Supreme Court looked with disfavor on sanitization in the context of impeachment, reasoning a jury would assume the prior conviction was identical to the charged crime. In addition, the trial court instructed the jury pursuant to CALCRIM No. 316 that the priors were to be considered "only in evaluating the credibility of the witness's testimony," a key issue. (See *People v. Holt* (1997) 15 Cal.4th 619, 662 ["Jurors are presumed to understand and follow the court's instructions."].)

To the extent appellant posits his priors were not probative to his credibility, the Supreme Court has ruled otherwise, noting, "[m]isconduct involving moral turpitude may suggest a willingness to lie." (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-297.) Although appellant argues the jury in the case at bar would not have made such an assumption as in *Barrick* and that sanitizing the priors would have focused the jury's

attention on his credibility, appellant has not shown how the court abused its discretion in not sanitizing the priors sua sponte or how counsel was ineffective for not requesting sanitization. Thus, not having established any prejudice, we reject appellant's claim of ineffective assistance of counsel. (See *People v. Ledesma* (1987) 43 Cal.3d 171, 217.)

Given appellant's brief acknowledgement of the priors, it is not reasonably probable that he would have had a more favorable result even if the priors had been sanitized. (See *People v. Collins*, *supra*, 42 Cal.3d at p. 391.) Accordingly, appellant was not denied his right to fair trial. (See *People v. Partida* (2005) 37 Cal.4th 428, 439.)

III. The court properly refused to instruct on voluntary manslaughter/heat of passion.

Appellant contends the court's rejection of his requested instruction on voluntary manslaughter: heat of passion compromised the constitutional integrity of the second degree murder verdict.

A. Background

At an unreported chambers conference, the court agreed to instruct on provocation as a basis for finding second rather than first degree murder and on voluntary manslaughter: imperfect self-defense/defense-of-others, but refused to give voluntary manslaughter: sudden quarrel/heat of passion instructions. Defense counsel argued appellant's testimony about the events at the Blarney Cove, including his responsive actions to an unprovoked attack on himself, his sister and his friend supported that instruction. The court declined to give the instruction noting that the provocation must come from the victim and that there was insufficient evidence of heat of passion.

B. Insufficient Evidence

"[T]he existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever

evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (Citations & italics omitted.) (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

"An intentional, unlawful homicide is upon a sudden quarrel or heat of passion (§ 192(a)), and is thus voluntary manslaughter, if the killer's reason was actually obscured as the result of a strong passion aroused by a provocation sufficient to cause an ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment. [N]o specific type of provocation [is] required . . . . Moreover, the passion aroused need not be anger or rage, but can be any [v]iolent, intense, high-wrought or enthusiastic emotion. However, if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter . . . ." (Citations & internal quotation marks omitted.) (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163.)

In part, CALCRIM No. 570 instructs: "The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment."

Although appellant recounts his version of the events at the Blarney Cove, appellant urges the court should look at his prior contact with Correa and Correa's fellow gang members, the "mad dogging" by that group, and his perception conflict would erupt between "these" two individuals. Appellant did not testify that Correa "mad dogged" him; rather he testified that his contact with Correa was friendly. "The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim." (*People v. Lee* (1999) 20 Cal.4th 47, 59.)

In *People v. Lucas* (1997) 55 Cal.App.4th 721, 739-740, there was evidence the victim had "smirked" at, looked at him "real dirty" and "dogged" (looked hard at) the

defendant. The court concluded that even if intimidating, that evidence alone could not be deemed enough to provoke a reasonable person to shoot someone. (*Id*. at p. 740.) Similarly, the acts cited by appellant could not be deemed enough to provoke appellant to stab fellow combatants in a fight and there was no indication Correa had done anything to provoke appellant. As noted by respondent, appellant had the knife during the entire fight, yet he entered the fight with his fists and did not use the knife until later suggesting his action in using the knife was not rash or without reflection.

"'It is not enough that provocation alone be demonstrated. There must also be evidence from which it be can inferred that the defendant's reason was in fact obscured by passion at the time of the act.'" (*People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1015.) Although appellant stated he feared for his life and the lives of his sister and friend, absent from appellant's recitation of the facts is any testimony that he was acting in the heat of passion (i.e., his reasoning was actually obscured) such as being hysterical, very upset or extremely upset. (See *People v. Brooks* (1986) 185 Cal.App.3d 687, 696.) Even after the stabbings, appellant had the presence of mind to jump the fence to an adjacent property, ditch his knife, go home and wash his clothes and then flee to another state.

Thus, there was no evidence that Correa provoked appellant or that appellant's reasoning was obscured.

DISPOSITION

The judgment is affirmed.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**